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RE MOHANA SUNDARI M SUBRAMANIAM EX P UNITED PRIME CORPORATION BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[BANKRUPTCY NO: D3-43-1835-1988]
19 DECEMBER 2003

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BANKRUPTCY: *Discharge - Conditional - Appeal against conditional discharge - Whether conditions imposed onerous, oppressive and unconscionable - Whether much reliance should be placed on size of debt still owing - Whether increase in instalment payments to official assignee justified - Whether sufficient weight should be given to cause of bankruptcy - Whether exemplary conduct of bankrupt should be taken into account*

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This was an appeal by the judgment debtor ('JD') against the decision of the Senior Assistant Registrar ('SAR') who allowed her application for an order of discharge from bankruptcy subject to the following conditions: (1) that she consent to judgment being entered in favour of the Official Assignee ('OA') for the balance of the provable debts pursuant to s. 33(10) of the Bankruptcy Act 1976 ('the Act'); (2) that she pay an increased amount of RM300 every month to the OA until the age of 65; and (3) that she submit an income and expenditure statement every six months to the OA.

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Held:

[1] Section 33(1) of the Act allows a discharge from bankruptcy. The fact that there is such a provision in the Act shows that it is intended that a bankrupt has some form of relief. The Act also expressly lays down certain guidelines when considering the discharge application. These guidelines if viewed as a whole show that the Act was designed to meet two major conflicting concerns. On the one hand that it will be undesirable to let those who become bankrupt off the hook if they have brought about their bankruptcy by dishonest business dealings, rash and extravagance in living and if they have conducted their business affairs to the detriment of their creditors. On the other hand, it will be in the interests of society and commercial morality that people who have become a bankrupt through little fault of their own but by just being caught at the wrong turn of the economic cycle be given a second chance in life. Further, the new s. 33A of the Act allows a bankrupt

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to apply to the OA directly to obtain his discharge after only five years of being a bankrupt. This new section is designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief. (p 628 e-h)

[2] A bankrupt must be examined as to his income and property before he is made to pay any monthly instalments to the OA. The reason being that a bankrupt must be allowed to support himself and his dependants. The cardinal rule is that a bankrupt cannot be converted into a mere slave or a personal chattel of his creditors. In the present case, when the JD applied for her discharge from bankruptcy the SAR increased her monthly instalments from RM250 to RM300 arbitrarily without first conducting an investigating into the affairs of the JD to determine whether the JD was in a position to comply with the order. With the JD's monthly income of RM500 it was definitely not sufficient to justify such an increase. It was noteworthy that the JD had made an effort to satisfy her creditors by earning an honest living. Further, instead of relieving the 14 years the JD endured as a bankrupt, the SAR ordered her to pay an increased amount to the OA until the age of 65. Such conditions were onerous, oppressive and unconscionable in the circumstances of the case. (pp 629 f-h & 630 a-b)

[3] The OA's report certified that the JD was not guilty of any of the matters prohibited by the Act. Her conduct was exemplary and she gave fullest co-operation to the authorities administering her bankruptcy. By virtue of s. 33(8) of the Act, the OA's report was prima facie proof of the matters contained therein and this evidence had not been rebutted. (p 630 f)

[4] The JD was only 25 years old when she was asked by her father to sign the guarantees that resulted in her bankruptcy. Being only 25 years of age, her father must have influenced her into signing them. These extenuating circumstances had placed her in an unusually adverse position. She was not in control of the company her father had incorporated in which she and her siblings were made directors of the company. She and her siblings had signed the guarantees at the behest of their father. This bankruptcy was thrust upon her through little fault of her own. (p 630 h)

[5] When considering an application to be discharged from bankruptcy the court cannot impose more onerous conditions on a bankrupt as this will be a disincentive for a bankrupt to try and obtain his discharge. Further, the amount of the debt still owing to the creditor is not a factor that the court should place much reliance on. (p 631 d-f)

[The JD was discharged from bankruptcy subject to only one condition pursuant to s. 33(10) of the Act.]

Case(s) referred to:
Ng Kok Wah v. UMW Industries (1985) Sdn Bhd [1995] 2 CLJ 2856 HC ***(refd)***
Re Hawkins; ex p Official Receiver [1892] 1 QB 890 ***(refd)***
Re Ng Lai Wat [1996] 2 SLR 106 ***(refd)***
Re Reilly, ex p The Debtor [1979] 23 ALR 375 ***(refd)***
Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation [1998] SLR 903 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 33A, 33(1), (3), (4), (6), (8), (10)
Penal Code, ss. 421, 422, 423, 424

For the appellant/judgment debtor - Leonard D'Cruz; M/s Sri Ram & Co
For the respondent/judgment creditor - SY Liew (Nordin Torji & Yussof Ahmad); M/s Cik Yusnita

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Ahmad Makinudin J:
This is an appeal by the judgment debtor against the decision of the senior assistant registrar in making an order that the judgment debtor be discharged from bankruptcy subject to the following conditions ("the Order for conditional discharge"):

(a) that the judgment debtor consents to judgment being entered in favour of the official assignee against the judgment debtor for the balance of the provable debts pursuant to s. 33(10) of the Bankruptcy Act 1967 ("the Act").

(b) that the judgment debtor pays an increased amount of RM300 every month to the official assignee on or before the 7th of each month to begin from November 2002 until judgment debtor reaches the age of 65; and

(c) that the judgment debtor submits an income and expenditure statement every six (6) months to the official assignee.

The said Order for conditional discharge was made by the learned senior assistant registrar at the hearing of the application for an Order of discharge filed by the judgment debtor as a bankrupt.

The Scheme For An Order Of Discharge Under The Provisions Of The Act

Section 33(1) of the Act reads as follows:

> A bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge and the Court shall appoint a day for hearing the application.

As to the principles to be applied in considering the application for an order of discharge, quite apart from case law which will be dealt with later in this judgment the Act does provide some guidance and this is reflected in the provisions of s. 33(3) and (4) read together with sub-s. (6) of the same section of the Act. These provisions of the Act provide amongst others a basis under which an Order of discharge is to be considered as follows:

(i) Whether the bankrupt has committed an offence under the Act and under ss. 421, 422, 423 or 424 of the Penal Code?; and

(ii) Whether the bankrupt's conduct fit into any of the categories of conduct as listed out in s. 33(6) of the Act?

It further follows that where it is proved to the satisfaction of the court that a bankrupt has committed any of the offence aforesaid or his conduct falls within the said list as spelt out then the court may:

(a) refuse the Order; or

(b) suspend the operation of the Order; or

(c) suspend the operation of the Order until a dividend of not less than fifty per centum has been paid to the creditors; or

(d) grant an order of discharge subject to such conditions as aforesaid.

I am of the view based on the above mentioned provisions of the Act it would appear that if a bankrupt is not guilty or in breach of any of the matters as aforesaid, then the court is empowered to discharge the bankrupt unconditionally taking into account the facts and circumstances of the case. As for the scheme and intention of Parliament in enacting these discharge provisions under the Act I would like to refer to the case of *Re Siah Ooi Choe, exp. Hongkong and Shanghai Banking Corporation* [1998] SLR 903 wherein his Lordship Warren LH Khoo J in examining the Singaporean equivalent to our s. 33 of the Act at p. 908 had this to say:

> the Act was designed to meet two major conflicting concerns. One stemmed from the fact that many an individual businessman become insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interests of society that people who had become bankrupt in such circumstances should be given a second chance in life ... The other concern was that, without proper safeguards, people who have used dishonest and fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrong doings.

I am of the view the fact that there is a provision in the Act which allows a discharge from bankruptcy itself shows it is intended that a bankrupt have some form of relief. The Act has also expressly laid down certain guidelines when considering the discharge application. These guidelines if viewed at as a whole, would tend to lean in support of the reasoning adopted by Justice Warren LH Khoo in the case cited above wherein it seeks to balance two major conflicting concerns. On the one hand, it would be undesirable to let those who become bankrupt off the hook if they have brought about their bankruptcy by dishonest business dealings, rash and extravagance in living and if they have conducted their business affairs to the detriment of their creditors. On the other hand, it would be in the interests of society and commercial morality that people who have become bankrupt through little fault of their own but by just being caught at the wrong turn of the economic cycle be given a second chance in life. This reasoning in my considered view is the true purpose, intent and scheme of the discharge provisions of the Act.

A further point which goes to support the argument as aforesaid is the provision of the new s. 33A of the Act. This new section allows a bankrupt to apply to the official assignee directly to obtain his discharge after only five (5) years of being a bankrupt. This new section in my view is designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief.

The Facts Of The Judgment Debtors's Case

The relevant facts in relation to the bankruptcy of the judgment debtor are as follows:

(a) following the incorporation of a company known as Percetakan Intisari Sdn Bhd ("the company") by the father of the judgment debtor on or about 4 August 1982, the judgment debtor and three (3) of her siblings were made directors of the company;

(b) though registered as directors of the company, the judgment debtor and her siblings had no control over the management and affairs of the company. Control of the company rested primarily with their father who, in particular handled all matters relating to money and finance;

(c) the judgment debtor's father applied for and obtained various credit, hire-purchase and lease facilities for the company around the year of 1983. The judgment debtor and her siblings were asked by their father to sign guarantees in respect of these facilities;

(d) at the time the judgment debtor was asked by her father to sign the guarantees which has resulted in her bankruptcy she was only about 25 years old and was under the direct care, control and guidance of her father as theirs was a traditional Indian family; and

(e) the judgment debtor was adjudged a bankrupt on 6 December 1989. To-date, the judgment debtor has endured almost 14 years of bankruptcy.

It is my view that the conditions imposed by the learned senior assistant registrar in requiring the judgment debtor to pay an increased amount from RM250 to RM300 every month until the age of 65, is onerous, oppressive and unconscionable in the circumstances of the case. It is trite law that a bankrupt must be examined as to his income and property before he is made to pay any monthly instalments to the official assignee. The reason being that a bankrupt must be allowed to support himself and his dependants. The cardinal rule is that a bankrupt cannot be converted into a mere slave or a personal chattel of his creditors. (See the case of *Re Hawkins; Exparte Official Receiver* [1892] 1 QB 890). In the present case when the judgment debtor applied for her discharge from bankruptcy, the senior assistant registrar increased her monthly instalments from RM250 to RM300 arbitrarily without first conducting an investigation into the affairs of the judgment debtor to determine if the judgment debtor was in a position to comply with the Order. It is my finding that with the judgment debtor's

monthly income of RM500 it is definitely not sufficient to justify such an increase. It is noteworthy that the judgment debtor has made an effort to satisfy her creditors by earning an honest living. It is also to be noted that on the judgment debtor's application to court for a discharge from bankruptcy, after enduring almost 14 years of the same, instead of relieving the endurance of 14 years, the senior assistant registrar whilst making the order for conditional discharge ordered that the judgment debtor pay an increased amount to the official assignee until she reaches the age of 65. With respect to the senior assistant registrar this decision is unconscionable in the circumstances of this case.

Taking into account the development of the law as well as current government policy on the issue of bankruptcy, I am of the view when a bankrupt applies to court for a discharge from bankruptcy, the court should take into account and consider the following factors:

(a) the report of the official assignee as to the bankrupt's conduct and affairs including the bankrupt's conduct at the time of the bankruptcy proceedings; and

(b) the cause of the bankrupt's insolvency, the bankrupt's conduct relevant to his bankruptcy, the conduct of the bankrupt subsequent to his insolvency, interests of the public at large and commercial morality.

In the present case by reference to the report filed by the official assignee it had been certified that the judgment debtor is not guilty of any of the matters prohibited by the Act and that the judgment debtor's conduct has been satisfactory and without fault. In other words, her conduct has been exemplary and the judgment debtor gave fullest co-operation to the authorities administering her bankruptcy. By virtue of the provision of s. 33(8) of the Act the report of the official assignee is to be taken as *prima facie* proof of the matters contained therein and this evidence has not been rebutted.

As to the circumstances that have led her into bankruptcy, it is clear that she was asked to sign guarantees by her father at an age of 25. Being only 25 years of age at the time, the bankrupt must have been influenced by her father into signing the guarantees. These extenuating circumstances have placed the judgment debtor in an unusually adverse position. The judgment debtor was not in control of the company and the guarantees were signed by her and her siblings at the behest of their father. This bankruptcy was effectively thrust upon the judgment debtor through little fault of her own.

On this point I would like to refer to the case of *Ng Kok Wah v. UMW Industries (1985) Sdn Bhd* [1995] 2 CLJ 2856. In this case, the bankrupt also signed guarantees for the benefit of his father's company. Taking into account the good conduct of the bankrupt during his bankruptcy and the circumstances that led the bankrupt into bankruptcy in the first place, his Lordship PS Gill J (as he then was), discharged the bankrupt subject to the one (1) condition that the bankrupt consents to judgment being entered in favour of the official assignee for the balance of the debts provable in his bankruptcy pursuant to s. 33(10) of the Bankruptcy Act 1967. In determining the bankruptcy, his Lordship dismissed the requirement that the bankrupt continues paying his monthly instalments to the official assignee.

Court Not To Impose More Onerous Conditions On The Bankrupt When Considering A Discharge From Bankruptcy

I am of the view when considering an application to be discharged from bankruptcy the court cannot impose more onerous conditions on a bankrupt as this would be a disincentive for a bankrupt to try and obtain his discharge. On this point I would like to refer to a passage in the case of *Re Ng Lai Wat* [1996] 2 SLR 106 wherein his Lordship Lai Siu Chiu J stated *inter alia* as follows:

> The Court should not impose conditions such that a bankrupt could not improve his position in life or make a fresh start, the condition should not be a disincentive to bankrupts.

Further in the case of *Re Reilly ex parte The Debtor* [1979] 23 ALR 375 it was also held *inter alia* in that case that more onerous conditions are unwarranted when considering a discharge.

Factors Not To Be Given Too Much Weight When Considering An Application To Be Discharged From Bankruptcy

I am also of the view that the amount of the debt still owing to the creditor is not a factor which the court should place too much reliance on when considering an application to be discharged from bankruptcy. In the case of *Re Siah Ooi Choe ex p Hongkong and Shanghai Banking Corporation (supra)* the court held on this point *inter alia* as follows:

> ... With reference to the size of the debt, the Court agreed that it was a very big one, but there was no upper limit set by the Act beyond which discharge was barred. The huge amount of debt here merely reflected the fact that a big business when it failed, tended to fail in a big way and it was in recognition of this fact that no maximum amount was stipulated in the Act.

This reasoning has also been adopted in Malaysia wherein in the case of *Ng Kok Wah v. UMW Industries (supra)* the court discharged the bankrupt subject to only one condition notwithstanding the sizeable amount of debt still owed to the creditor. In imposing that one (1) condition, the court dismissed the requirement that the bankrupt continues to pay the monthly instalments to the official assignee. Based on this reasoning, I take the view that as the Act does not stipulate an upper limit beyond which discharge is barred, the fact that the debt owed by the judgment debtor is a big one should not be given too much weight if any at all.

Another factor which is altogether not to be taken into account is the fact of whether or not the bankrupt is in a position to afford and continue paying the monthly instalments. Nowhere is it stated in the provisions of the Act. or in the case law analysis cited hereinabove that such a factor is to be taken into account and the court should be slow in accepting such an argument.

Conclusion

The judgment debtor has been a bankrupt for almost 14 years and that 14 years is a long period of penance by any measure. The judgment debtor is now currently 45 years of age and humbly desires to spend the remainder of her mortal life free from the shackles and stigma of bankruptcy that has plagued her for so many years. It is my finding that the senior assistant registrar in pronouncing the said Order for conditional discharge has:

(a) misdirected herself in law when she allowed the application to discharge from bankruptcy subject to more onerous conditions;

(b) taken into account and given too much weight to irrelevant factors such as the size of the debt still owing to the creditors and the judgment debtor's ability or inability to continue paying the monthly instalments;

(c) misdirected herself in law when she increased the monthly instalments summarily without first conducting an investigation into the judgment debtor's ability to pay the same; and

(d) failed to take into account and/or given sufficient weight to pertinent factors such as the cause of the judgment debtor's bankruptcy, the exemplary conduct of the judgment debtor during the bankruptcy, commercial morality and interests of the public at large.

In the circumstances of this case, an Order that the judgment debtor be discharged from bankruptcy subject to only one condition, that is, the condition pursuant to s. 33(10) of the Act would be the more appropriate order to be made. I therefore allowed the judgment debtors appeal and henceforth make such an Order. The said Order for conditional discharge made by the learned senior assistant registrar is hereby set aside and there shall be no order as to costs in respect of the proceedings in this appeal.